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No. 98-1511

IN THE

Supreme Court of the United States

CITY OF AUBURN, a municipal corporation of the State of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation; BURLINGTON NORTHERN SANTA FE ACQUISITION, INC.; and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL J. REYNOLDS
JUDITH C. AUSMAN
KAREN C. GULLIVER
AUBURN CITY ATTORNEY'S OFFICE
25 West Main Street
Auburn, WA 98001
(253) 931-3030

PETER J. EGLICK
Counsel of Record
HELSELL FETTERMAN LLP
Suite 1500
1325 Fourth Avenue
Seattle, WA 98101
(206) 292-1144

Attorneys for Petitioner

153319

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Respondent Burlington Northern ("BNSF") and the federal respondents oppose certiorari by offering a soothing interpretation of the Ninth Circuit's extreme decision. Burlington suggests:

> Simply put, there is nothing particularly unusual or environmentally threatening about this decision so as to make it either exceptionally important or nationally significant.

BNSF at 13. Similarly, the federal respondents belittle petitioner's concerns:

> Petitioner contends that the decision below threatens to foreclose *any* application of state and local police power regulations to activities associated with railroads. That is incorrect.

Federal Respondents at 9 (italics in original). A more candid assessment by respondents of the scope of the Ninth Circuit ruling, demonstrating why *certiorari* is appropriate now, can be found in Appendix A to the Brief of *Amicus Curiae* City of Tukwila, Washington, recently submitted to this Court. In Appendix A, a letter from Dennis Wilson,[1] BNSF counsel, to the Tukwila City Attorney, BNSF objects to Tukwila's proposal to substitute one street for another as access to a BNSF railyard, citing the Ninth Circuit decision as barring City closure or regulation of traffic on one of its own streets:

> The Court held that any such state and local interference with interstate commerce is

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1. Mr. Wilson is also listed as counsel on BNSF's brief in opposition filed in this Court.

> preempted by federal law, and therefore, is beyond the authority of a city or local government.

City of Tukwila *Amicus Curiae* Brief at 3a. According to BNSF, the Ninth Circuit decision even prevents the City from taking any action which might "cost BNSF intermodal business":[2]

> Consequently, the City would be liable for damages under both Washington state and federal law if the City were to deny BNSF reasonable access to this facility, or cost BNSF intermodal business by threatening to deny such access.

Id.

In light of this ominous analysis by Burlington, its representation to this Court that state law remedies which "do not impede or halt railroad activity" are not prohibited by the Ninth Circuit's decision rings hollow. When the test of impedance is any effect on the bottom line, then the sweep of preemption is unlimited.

Similarly, the federal respondents tell this Court that the preemption decision here is narrow, limited to the Stampede Pass project. Federal Respondents at 9. Yet, in a subsequent decision in another case, the STB cited its

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2. BNSF charitably conceded that the City might be able to close a portion of its street and provide an alternative route but only "so long as such use did not increase BNSF's cost," taking its cue from the Ninth Circuit extreme proposition that *any* state action affecting the railroad's bottom line was preempted. *Id.*

Auburn declaratory preemption ruling as determinative, in sweeping terms which match if not exceed the extreme scope of the Ninth Circuit decision which upheld it:

> Moreover, as we explained in a declaratory order decision in the Stampede Pass cases, the provisions of 49 U.S.C. 10501(b) preempt state and local regulation to *the maximum extent permitted by the Constitution.* [footnote citations omitted] This would include, for example, state and local permitting or pre-clearance requirements, including environmental requirements, *which by their very nature interfere with interstate commerce because they impede the carrier's right to conduct its operations.*

Union Pacific Railroad Company — Petition for Declaratory Order, STB Finance Docket No. 33611, 1998 STB Lexis 227, August 19, 1998 at p. 12 (emphasis added).

The STB offered that sweeping description in the context of a decision that it did not have jurisdiction over a railroad project, and therefore had no jurisdiction to review its environmental and safety issues:

> Finally, we are mindful of the safety and environmental concerns that have been raised, including concerns for children living in houses next to the line, road crossings without crossing arms, and derailments threatening the water supply. These are serious matters which, if the Board had jurisdiction, we would analyze and weigh in determining how to proceed.

Id. The result, then, based on the Auburn decision, is a perfect regulatory void: no jurisdiction by the STB and simultaneous maximum preemption so no jurisdiction is vested in any other governmental agency concerned with public health or safety.

The federal respondents make the nonsensical claim (brief at p. 10) that the preemption decision is reasonable because, while it forecloses requiring permits, it allows imposition of after-the-fact fines. There is no basis for assuming that a fine can be imposed after-the-fact for an activity for which a local government could not have required advance review.

In attempting to downplay the scope and importance of the Ninth Circuit's decision, respondents also make a number of incorrect factual statements. The Stampede Pass Line was not just in need of a bit of freshening up (BNSF calls it "modernization")[3] when this case arose — it was impassable and in need of major reconstruction. E.R. Tab 1, Exhibit I. In fact, Burlington's original press release announcing the Stampede Pass Line trumpeted plans to spend $125,000,000 "to reopen the Stampede Pass line." ER Tab 1, Exhibit C. It described extensive work which would occur "between Auburn and Cle Elum." *Id.* It further assured that:

> Constructions permits were applied for on April 18th with King and Kittitas Counties and *work will not begin until those permits are issued.*

Id. (emphasis added). The work included "rail and tie replacement, and surface corrections *between Auburn and*

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3. BNSF Brief at 2.

Cle Elum," including "resurfacing of *the entire line*" and the laying of 129,000 new concrete ties, 163,000 new wood ties, and 43 miles of new rail. *Id.* (emphasis added).

The Federal respondents now suggest to justify preemption that "when delays ensued during the permit review process, however, BN contended that federal law preempted local environmental regulation." Federal Respondents Brief at p. 3. However, the supporting citation offered ("see Pet. App. 9a, 24a") only vouches for the fact that the railroad first applied for permits and then switched to a claim that they were not necessary. They do not support the contention of delays during the permit review process; the process was aborted before it could even reach first base. Had the process been allowed to proceed, it would have done so under very strict time constraints established under the Washington Regulatory Reform Act, RCW Chapter 36.70B.[4]

Burlington also quotes, out of context, a letter which Burlington characterizes as stating Auburn's "intent to stop the re-opening of the rail line if its demands were not met." BNSF Brief at 2-3. In fact, as the record reflects, Auburn consistently advised that it neither asserted the authority to stop the railroad nor had any desire to do so:

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4. BNSF makes a new assertion that some state and local jurisdictions "prefer to coordinate with BNSF through an informal, non-binding permit process." BNSF at 3. Its citation to the record does not support this claim. The record does reflect that, until this case arose, BNSF and other railroads in Washington consistently went through the state and local permitting process on both large and small projects. ER Tab 4, Exhibits D, E.

> Essentially, we believe that the Washington SEPA statute is not one which allows a local unit of government to deny the railroads the right to operate. Rather, SEPA requires a review of impacts and provides for mitigation and as such is not subject to preemption.

Letter from City of Auburn to Kittitas County concerning BNSF application, ER Tab 1, Exhibit I, at p. 3. At the same time, BNSF's claim that Auburn is not affected by and does not assert any right "to directly regulate" BNSF Stampede Pass line improvement is inaccurate. Auburn has the authority — and the obligation under state law — to participate in environmental review and regulation of aspects of the improvements (which, as noted above, did extend into the City), their impacts, and associated actions (e.g., the Burlington intermodal yard in downtown Auburn).

Both the federal respondents and BNSF suggest that the Court should deny review of the Ninth Circuit decision because the Stampede Pass line work is completed. *See, e.g.*, Federal Respondents at 6, note 4. However, the purpose of Auburn's participation has been to obtain review and mitigation of impacts of the proposal under the State Environmental Policy Act and other applicable laws. Review and mitigation can still occur, regardless of whether the line is open.

Similarly, BNSF's carefully worded claim that it "currently has no plans to construct a new or expanded intermodal facility at the current railyard in Auburn" is beside the point. BNSF at 26. Under the respondents' interpretation, the Ninth Circuit decision effectively eliminates Auburn — and state and county — jurisdiction

over the *current* Auburn railyard, apart from any expansion. According to Burlington's letter to *amicus* City of Tukwila, the decision would prohibit Auburn, right now, from changing traffic patterns on its downtown streets in the vicinity of the railyard if there were any conceivable effect on BNSF's costs or bottom line. In other words, the purported effect of the Ninth Circuit decision is immediate and continuing, regardless of whether the exacerbating factor of Burlington's planned intermodal yard is activated today or tomorrow.

Federal respondents raise a new and irrelevant issue in suggesting that Auburn is objecting only because the Ninth Circuit "overlooked concerns that BN would construct an intermodal yard in Auburn *without further review by the STB*." Federal Respondents' Brief at 9 (emphasis added). It is undisputed that the STB would have no jurisdiction over the intermodal yard in the absence of a triggering transaction (*e.g.*, merger or acquisition) to invoke it.[5] The City's concern was — and is — that, per the respondents, the Ninth Circuit's decision sweeps aside all state and local regulations applicable to a railyard, its expansion — or to any other nontransactional railroad activities — and leaves nothing in its place, even where the activity in question is not subject to federal regulation. This is not hypothetical: the *amici* submissions to this Court in support of *certiorari* describe circumstances — in addition to those in Auburn — where this is occurring.

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5. For this reason, the repetition of the Ninth Circuit's conclusion that the STB environmental review of the Stampede Pass reopening was conducted "as mandated by law" is no answer here: the scope of that review was limited by those laws and the STB's jurisdiction and did not take into account state and local police power concerns.

As the *amicus curiae* point out and as the STB's own ruling in the Union Pacific case illustrates, the federal respondents are incorrect that the administrative and judicial process of construction of preemption by the ICCTA "has only recently begun." Federal Respondents at 11. The process was completed with the Ninth Circuit decision. The federal agency which respondents claim has jurisdiction over interpretation of the ICCTA has issued a sweeping declaratory ruling under the ICCTA. That ruling has been upheld, in even more sweeping terms, by the Ninth Circuit. The STB and the railroads are now going about the business of applying that decision in its broadest and most extreme terms in every available instance. Because the fundamental premise of this nationally applicable decision is flawed, the time to address it is now, before it has further metastasized.[6]

Grant of the Petition for Certiorari presents a timely and effective means of putting the concept of preemption under the ICCTA back on a more reasonable track, consistent with concepts of federalism.

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6. In this context, the federal respondents' suggestion that the Board will have further occasion to examine the implication of its decision is disingenuous. As illustrated by the Union Pacific STB decision cited above, the Board eschews jurisdiction over railroad activities at the same time that it repeats the premise, citing to the Auburn decision, that local and state regulation are preempted. The result is *not* a light-touched evolution of the law on preemption by the STB on a case-by-case basis, as respondents promise.

CONCLUSION

For these reasons, as well as those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

PETER J. EGLICK
Counsel of Record
HELSELL FETTERMAN LLP
Suite 1500
1325 Fourth Avenue
Seattle, WA 98101
(206) 292-1144

MICHAEL J. REYNOLDS
JUDITH C. AUSMAN
KAREN C. GULLIVER
AUBURN CITY ATTORNEY'S OFFICE
25 West Main Street
Auburn, WA 98001
(253) 931-3030

Attorneys for Petitioner